R 23-307 Field

Feb. 19. 1875

C. J. Waite

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 553.

MARSHALL B. BLAKE, COLLECTOR OF INTERNAL REVENUE,
PLAINTIFF IN ERROR,

vs.

THE NATIONAL CITY BANK OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 6, 1874.

Oct. 2, 1874

In the Supreme Court of the United States.

M. B. BLAKE, COLLECTOR, &C.,
vs.
THE NATIONAL CITY BANK. } No. 553.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the collector.

This was an action of assumpsit, brought by the bank against the collector, to recover the amount which he had compelled it to pay as a tax, of 2½ per cent. upon (1) a dividend of earnings ($102,564.10) declared in October, 1870, payable November 1, 1870, such earnings having accrued between May 1, 1870, and October 31, 1870, and (2) a sum ($32,058.29) earned during the above period, added to its surplus November 1, 1870, as also upon other amounts, which, however, the bank failed to recover below.

Judgment having been given for the bank upon the items above mentioned, the collector brought this writ of error.

We assign for error the ruling of the court that no tax was due by law upon the dividend and surplus above mentioned.

For an argument we refer to our brief in the case of Kinney *vs.* The Philadelphia and Reading Railroad Company, which has been appointed to be heard in connection with this cause.

GEORGE H. WILLIAMS,
Attorney-General.

S. F. PHILLIPS,
Solicitor-General.

SUPREME COURT OF THE UNITED STATES.

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THE NATIONAL CITY BANK OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the National City Bank, plaintiff, and Marshall B. Blake, defendant, a manifest error hath happened, to the great damage of the said Marshall B. Blake, defendant, as is said and as appears by his complaint. We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid on the 2d Monday of October, 1874, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 23rd day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 (Indorsed:) U. S. Supreme Court. Marshall B. Blake, plff. in error, vs. The National City Bank, deft. in error. Writ of error. George Bliss, atty. for plff. in error.

Within writ is hereby allowed.
Sept 23d, 1874.

SAM'L BLATCHFORD, *D. J.*

Fil' Sept. 25, 1874.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

3 I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one to thirty-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Marshall B. Blake, plaintiff in error, against the National City Bank, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 26th day of September, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE,
Clerk.

4 Circuit court of the United States for the southern district of New York.

THE NATIONAL CITY BANK OF NEW YORK, plaintiffs,
vs.
MARSHAL B. BLAKE, DEFENDANT.

Pleas before the judge of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court building, No. 41 Chambers street, in the city of New York, of the term of October, 1873, to wit, of the 7th day of February, in the year of our Lord one thousand eight hundred and seventy-four.

Witness the honorable Lewis B. Woodruff, judge of the said court.

KENNETH G. WHITE,
Clerk.

5 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 25th day of September, 1872, in April term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court building, No. 41 Chambers street, in the city of New York, in the said district, before the judge of the said court, came the National City Bank of New York, by Francis C. Barlow, its attorney, and brought then and there into the said court, before the judge thereof, its certain declaration against Marshal B. Blake (being in custody, &c.) of a plea of trespass on the case upon promises; which said declaration follows in the words, that is to say:

6 Circuit court of the United States for the southern district of New York, in the second circuit.

THE NATIONAL CITY BANK OF NEW YORK, plaintiffs,
vs.
MARSHAL B. BLAKE, DEFENDANT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The plaintiffs, by Francis C. Barlow, their attorney, come here into court, and suggest, and give the court now here to understand and be informed, that heretofore, to wit, on the 2 day of August, 1872, a suit was duly commenced in the supreme court of the State of New York, in the county of New York, by the plaintiffs above named, against the defendant herein, by summons upon and for the same cause of action hereinafter set forth.

That the said defendant afterwards duly appeared in said suit, by Noah Davis, esq., his attorney, and such proceedings were had
7 thereupon, that afterward, to wit, on the 6th day of August, 1872, said suit was duly removed by writ of certiorari to this court, agreeably to the provisions of the statute in such case made and provided.

That upon the removal of such suit, it is made to appear to this court that no copy of the record and proceedings therein in said supreme court can be obtained, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore, let the plaintiffs proceed de novo, and file a declaration of their cause of action, and let the parties thereupon proceed as in an action originally brought in this court.

And the plaintiffs now, according to law, by their attorney aforesaid, complain of the defendant herein in a plea of trespass on the case upon promises:

For that, whereas, the said plaintiffs at all the times hereinafter mentioned, to wit, from the first day of July, 1870, up to the present time, were, and still are, a body corporate, or bank incorporated and existing for the purpose of carrying on the business of banking, under
8 and by virtue of a law of the Congress of the United States, passed June 3rd, 1864, and entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof."

And, as such association or corporation, were and are located in the city, county, and State of New York, in the thirty-second collection district of said State, and therein carried on said business of banking, and had power and capacity to sue by the name of the National City Bank of New York; and

Whereas, on the 18th day of October, 1870, the said plaintiffs declared a dividend of $102,564.10 from its earnings, incomes, and gains, which dividend was, by the terms of its declaration, made payable to stockholders on the first day of November, 1870, and which accrued and was declared and paid out of the earnings, income, and gains of the plaintiffs for the six months beginning on the first day of May, 1870, and of which $51,282.05, part thereof, was declared and paid out of the earnings, income, and gains of the plaintiffs for the months of
9 August, September, and October, 1870; and said dividend was forthwith, on and after the said first day of November, 1870, paid by the plaintiffs to the several stockholders thereof entitled to the same, and neither the tax of two and one-half per centum hereinafter mentioned, nor any other tax or sum whatever was deducted or withheld by said plaintiffs from said dividend or the payment thereof; and

Whereas, on the first day of November, 1870, the said plaintiffs added to their surplus the sum of $32,058.29 of its undivided profits which accrued and were earned in and during the six months beginning on the first day of May, 1870, and of which $16,029.14, part thereof, accrued and was earned in and during the months of August, September, and October, 1870; and

Whereas, on the twenty-first day of November, 1871, the plaintiffs did pay to the proper officers, to wit, the receiver of taxes of the city of New York, the sum of $15,749.39, as and for the city, county, and State tax of the city, county, and State of New York imposed by law upon the shares of the stock of the plaintiffs' bank
10 held by the stockholders thereof, and which payment was made for the account and behalf of the stockholders of the plaintiffs, and would have been, if it had not been paid as taxes as aforesaid, divided as a dividend to said stockholders in addition to the dividend above mentioned, and which sum of $15,749.39 was so paid by the plaintiffs out of the gains, income, and profits of the plaintiffs, which was earned and accrued during the six months from May first, 1870, to November first, 1870, and of which $7,874.69, part thereof, was earned and accrued during the months of August, September, and October, 1870.

And whereas, also, on the fifteenth day of April, 1871, the said plaintiffs declared a dividend of $102,564.10 from its earnings, income, and gains, which dividend was by the terms of its declaration made payable

to stockholders on the first day of May, 1871, and which accrued and was declared and paid out of the earnings, income, and gains of the plaintiffs for the six months beginning on the first day of November, 1870, and of which $34,188.63, part thereof, was declared and paid
11 out of the earnings, income, and gains of the plaintiffs for the months of November & December, 1870, and said dividend was forthwith and on and after the first day of May, 1871, paid by the plaintiffs to the several stockholders thereof entitled to receive the same, and neither the tax of two and one-half per centum hereinafter mentioned, nor any other tax or sum whatsoever, was deducted or withheld by said plaintiffs from said dividend, or the payment thereof.

And whereas, on the first day of May, 1871, the said plaintiffs added to their surplus the sum of $16,029.79 of its undivided profits which accrued and were earned in and during the six months beginning on the first day of November, 1870, and of which $5,343.26, part thereof, accrued and was earned in and during the months of November & December, 1870.

And whereas, also, the assessor of internal revenue of the United States in and for the said thirty-second collection district of the State of New York, did afterwards, to wit, on the 15th day of June, 1871, under a false and illegal claim, that a tax of two and one-half per cent. was by law due to the Government of the United States
12 upon the amount of said dividends, and upon the said amounts so as aforesaid added to surplus and upon said amount so as aforesaid paid as city, county, & State taxes, assess an erroneous and illegal tax against the plaintiffs of two and one-half per cent. upon the said several amounts of $102,564.10, $32,058.29, $15,749.39, $102,564.10, and $16,029.79 above described, to wit, upon said dividend declared on October 18th, 1870, the sum of $2,564.10, (of which $1,282.05 was the tax so assessed upon the aforesaid $51,282.05, which was the portion of said dividend which accrued and was earned in the months of August, September, & October, 1870;) and upon said amount added to surplus on November 1st, 1870, the sum of $801.45, (of which $400.72 was the tax so assessed upon the aforesaid $16,029.14, which was the portion of said addition to surplus which was earned and accrued in and during the months of August, September, & October, 1870;) and upon said amount paid as city, county, and State taxes the sum of $393.73, (of which $196.86 was the tax so assessed upon the aforesaid $7,874.69, which was the portion of said amounts so paid for city, county,
13 & State taxes, which accrued and was earned in the months of August, September, & October, 1870;) and upon said dividend declared on April 15th, 1871, the sum of $2,564.10, (of which $854.70 was the tax so assessed upon the aforesaid $34,188.03, which was the portion of said dividend which accrued and was earned in and during the months of November & December, 1870;) and upon said amount added to surplus on May 1st, 1871, the sum of $400.74, (of which $133.58 was the tax so assessed upon the aforesaid $5,343.26, which was the portion of said addition to surplus which accrued and was earned in and during the months of November & December, 1870;) the aggregate of all which amounts so erroneously & illegally assessed as aforesaid was the sum of $6,724.12, of which the sum of $2,867.91 was a tax of two and one-half per cent. upon the gains, income, and profits of the plaintiffs, which accrued and was earned in and during the months of August, September, & October, 1870; all of which said taxes were illegal and erroneously assessed as aforesaid, when in truth and fact the said plaintiffs were exempt from any taxa-
14 tion from said dividends, amounts added to surplus, and amount

paid for city, county, and State taxes, or any part thereof, (for the reason that neither the act of Congress of June 30th, 1864, and the several amendments thereto, nor the act of Congress of July 14, 1870, nor any other provisions of law in that behalf imposed or were intended to impose any tax upon the said dividends, additions to surplus or amount paid as aforesaid for city, county, or State taxes, or any parts thereof, and for the further reason that said acts are not authorized by the Constitution of the United States,) and the said plaintiffs then and there protested against said assessments and against the payment of any such illegal and erroneous taxes, or any part thereof.

And whereas, also, during all the time aforesaid, and at the time of the payment hereinafter mentioned, the defendant held the office and performed the duties of collector of internal revenue in and for the said thirty-second collection district of the State of New York, and, on or about the first day of July, 1871, as such collector, illegally de-
15 manded of the plaintiffs the payment of the said taxes so illegally & erroneously assessed, as aforesaid, and they, the said plaintiffs, were compelled to, and did, on the first day of July, 1871, pay to the defendant as such collector, under protest and duress, and by compulsion, the said erroneous and illegal taxes, amounting in the aggregate to the sum of $6,724.12, which sum the said defendant, as such collector as aforesaid, received and collected from the said plaintiffs in the manner aforesaid.

And whereas, also, on or about the 8th day of January, 1872, said plaintiffs, according to the provisions of law in that behalf and the regulations made by the Secretary of the Treasury in pursuance thereof, made an appeal to the Commissioner of Internal Revenue from the said erroneous and illegal assessments upon and collections from the said plaintiffs of the aforesaid erroneous taxes, by which said appeal the said plaintiffs did claim and demand that the said Commissioner of Internal Revenue should remit and refund to the said plaintiffs the said sums of money so paid by the said plaintiffs to the said defendant,
16 as aforesaid, as and for said erroneous and illegal taxes aforesaid; and

Whereas a decision in said appeal has been delayed more than six months from the date of said appeal, (and had been so delayed at the time of the commencement of this action,) and this action is now brought by these plaintiffs after the expiration of six months from the date of said appeal, and within one year from the date of said appeal.

By means of which several premises the said defendant then and there became liable to pay back to the said plaintiffs the said sum of money, together with the lawful interest thereon from the time of the payment thereof to the said defendant as above mentioned; and being so liable, the defendant, in consideration thereof, heretofore, to wit, on the first day of July, 1871, at New York, in said district, undertook, and then & there faithfully promised the said plaintiffs to pay them the said sum of $6,724.12 and said interest, when he, the said defendant, should be thereunto afterwards requested. Yet the said defendant,
17 although often requested, the same has not paid, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused, and doth still refuse, to the damage of the said plaintiffs of eight thousand dollars.

And whereas, also, the said defendant afterwards, to wit, on the first day of July, A. D. 1871, and at the place aforesaid, being then and there collector of internal revenue for the thirty-second collection district of New York, was indebted to the said plaintiffs in the sum of eight thou-

sand dollars lawful money of the United States of America, for money before that time lent and advanced by said plaintiffs to said defendant at the special instance and request of him, the said defendant;

And for other moneys by said plaintiffs before that time paid, laid out, and expended for the said defendant at the special instance and request of him, the said defendant;

And for other moneys by the said defendant before that time had and received, to the use of the said plaintiffs;

And being so indebted, the said defendant, in consideration
18 thereof, afterwards, to wit, on the first day of July, A. D. 1871, and at the place last aforesaid, undertook and faithfully promised the said plaintiffs well and truly to pay to the said plaintiffs the said sum of money when the said defendants should be afterwards thereunto requested.

And whereas, also, the said defendant afterwards, to wit, on the first day of July, A. D. 1871, and at the place last aforesaid, accounted, together with the said plaintiffs, of and concerning divers and other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of eight thousand dollars, and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the first day of July, A. D. 1871, and at the place last aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned when the said defendant should be thereunto requested.

Nevertheless, the said defendant, though often thereunto requested,
has not paid the said several sums of money above mentioned, or
19 any or either of them or any part thereof, to the said plaintiffs, but to pay the said sums or any part thereof, has hitherto wholly refused and doth still refuse, to the damage of the said plaintiffs of eight thousand dollars. And therefore the said plaintiffs bring this suit, &c.

20 And the said Marshal B. Blake, defendant in this suit, by Noah Davis, esq., United States district attorney, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared, against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

Therefore the issue above joined is ordered by the said court to be tried at the term of the said court appointed to be held at the city of New York on the third Monday of October, 1872.

Afterwards, that is to say, on the day and at the place before mentioned, before the judge of the said court, came, as well the above-named plaintiff as the above-named defendant, by their respective attorneys aforesaid, but the said cause was not tried but continued from
term to term to the 7th day of February, 1874, at which time and
21 at the place before mentioned, before the judge of the said court, came, as well the above-named plaintiff as the above-named defendant, by their respective attorneys aforesaid.

And the respective parties did then and there waive a trial by jury in open court, and filed a stipulation in writing to that effect, and thereupon agreed in writing upon the facts in the above cause in the words following, to wit:

22 U. S. circuit court, southern district of New York.

THE NATIONAL CITY BANK OF NEW YORK, plaintiffs,
vs.
MARSHALL B. BLAKE, DEFENDANT.

For the purposes of the trial of this action, the following facts are agreed upon:

That the allegations of the declaration down to the words "And whereas on the 18th day of October, 1870, the said plaintiffs declared a dividend," are true.

That on the 18th day of October, 1870, the plaintiffs declared a dividend of $102,564$\frac{10}{100}$ from its earnings, income, and gains, and that said dividend was, by the terms of its declaration, made payable to stockholders on the first day of November, 1870, and was, prior to the assessment hereinafter mentioned, paid to the several stockholders entitled to receive the same, and that neither the tax of two and one-half per cent. hereinafter mentioned, nor any other tax whatsoever, was deducted or withheld by said plaintiffs from said dividend or the payment
23 thereof to stockholders, said earnings, incomes, and gains accrued during the period from May 1st, 1870, to October 31st, 1870, inclusive.

That on November first, 1870, the plaintiffs added to their surplus the sum of $32,058$\frac{29}{100}$ of their undivided profits; said undivided profits accrued and were earned during the period from May 1st to October 31st, 1870, inclusive.

That on the 21st day of November, 1870, the plaintiffs paid to the receiver of taxes of the city and county of New York the sum of $15,749$\frac{39}{100}$, as and for the city, county, and State tax of the city, county, and State of New York, all imposed by law upon the shares of stock of the plaintiffs' bank held by the stockholders thereof, which payment was made for the account and behalf of the stockholders of the plaintiffs, and which amount, unless so paid as taxes, would have been paid to stockholders as a part of said dividend declared in October 18th, 1870. Said taxes were paid with money taken from undivided profits which accrued and were earned during the period from May 1st to October 31st, 1870.

That on the 15th day of April, 1871, the plaintiffs declared a
24 dividend of $102,564$\frac{10}{100}$ from its earnings, incomes, and gains, which dividend was, by the terms of its declaration, made payable to stockholders on the first day of May, 1871; said earnings accrued from November 1st, 1870, to April 30, 1871, inclusive.

That on the first day of May, 1871, the plaintiffs added to their surplus the sum of $16,029$\frac{79}{100}$ of its undivided profits. Said undivided profits accrued and were earned during the period from Nov. 1, 1870, to April 30, 1871, inclusive.

That the assessor of internal revenue of the United States in and for the 32nd collection district of the State of New York, did, on the 20th day of June, 1871, assess against the plaintiff a tax of two and one-half per cent. on the several foregoing amounts of $102,564$\frac{10}{100}$, $32,658$\frac{29}{100}$, $15,749$\frac{39}{100}$, $102,564$\frac{10}{100}$, and $16,029$\frac{79}{100}$, the aggregate of which amounts of taxes so assessed was $6,724$\frac{12}{100}$.

That on said June 20th, 1871, and ever since that time, the defendant held and now holds the office of collector of internal revenue of the United States in and for the 32d collection district of State of New

York, and then performed and now performs the duties of said
25 office.

That on the 30th day of June, 1871, the defendant, as such collector, demanded from the plaintiffs the payment of said taxes so assessed as aforesaid, amounting to said sum of $6,724\frac{12}{100}$, and that on said June 30th, 1871, the plaintiffs were compelled to and did, under protest, pay said sum to the defendant as such collector, and the defendant received the same.

That on the 8th day of January, 1872, the plaintiffs, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury in pursuance thereof, made an appeal to the Commissioner of Internal Revenue from the aforesaid assessment and collection, in and by which appeal the plaintiffs demanded that the sum of $4,747\frac{56}{100}$ of the amount so assessed and collected as aforesaid should be refunded to the plaintiffs.

That a decision on said appeal was delayed more than six months from the date of said appeal, and had been so delayed at the
26 time of the commencement of this action, and that this action was brought by the plaintiffs after the expiration of six months from the date of said appeal, and within one year from the date of said appeal.

GEORGE BLISS,
U. S. Atty.

DEC'R 18, 1873.

27 And the said cause being then and there argued by the said attorneys for the respective parties, and the court having taken the same under advisement, the said judge of said circuit court finds that the said defendant did undertake and promise in manner and form as the said plaintiff hath above complained against him, and assesses the damages of the said plaintiff by reason of the premises over and above its costs and charges by it about its suit in this behalf expended, to the
$5,767.28 amount of $5,767\frac{28}{100}$, being amount claimed, with interest to date added.

Therefore, it is considered that the said plaintiff do recover against the said defendant its said damages, costs, and charges by the judge aforesaid assessed, and also ninety-two dollars for its costs and charges by the court here adjudged, of increase, to the said plaintiff, with his assent, which said damages, costs, and charges, in the whole,
$5,859.28 amount to fifty-eight hundred & fifty-nine & $\frac{28}{100}$ dollars.

And said defendant in mercy, &c.

Judgment signed this 22d day of September, 1874.

R. E. STILWELL, *Dep. Clerk.*

(Indorsed:) U. S. circuit court. The National City Bank vs. Marshall B. Blake. Judgment record. Francis C. Barlow, plff. atty. Deft., costs, total. Filed Sept. 22d, 1874.

28 U. S. circuit court.

THE NATIONAL CITY BANK
vs.
MARSHALL B. BLAKE. } Bill of exceptions.

This cause came on for trial at the October term of the United States circuit court for the southern district of New York, in the second

circuit, to wit, on the 7th day of February, in the year 1874, in said term, before the honorable Nathaniel Shipman, judge, a jury having been duly waived by the respective parties, pursuant to the act of Congress.

Plaintiffs' counsel read the following agreed statements of facts:

"For the purpose of the trial of this action, the following facts are agreed upon:

"That the allegations of the declaration, down to the words, 'And whereas on the 18th day of October, 1870, the said plaintiffs declared a dividend,' are true.

"That on the 18th day of October, 1870, the plaintiffs declared a dividend of one hundred and two thousand five hundred and sixty-four and $\frac{10}{100}$ dollars ($102,564$\frac{10}{100}$) from its earnings, incomes, and gains,
29 and that said dividend was, by the terms of its declaration, made payable to stockholders on the first day of November, 1870, and was prior to the assessment hereinafter mentioned paid to the several stockholders entitled to receive the same; and that neither the tax of two and one-half per cent. hereinafter mentioned, nor any other tax whatsoever, was deducted or withheld by said plaintiffs from said dividend, or the payment thereof to stockholders. Said earnings, incomes, and gains accrued during the period from May 1st, 1870, to October 31st, 1870, inclusive.

"That on November 1st, 1870, the plaintiffs added to their surplus the sum of $32,058$\frac{29}{100}$ of their undivided profit. Said undivided profits accrued and were earned during the period from May 1st to October 31st, 1870, inclusive.

"That on the 21st day of November, 1870, the plaintiffs paid to the receiver of taxes of the city and county of New York the sum of $15,749$\frac{39}{100}$, as and for the city, county, and State tax of the city, county, and State of New York, all imposed by law upon the shares of the stock of the plaintiffs' bank, held by the stockholders thereof, which payment was made for the account and benefit of the stockholders
30 of the plaintiffs, and which amount, unless so paid as taxes, would have been paid to stockholders as a part of said dividend declared on October 18th, 1870. Said taxes were paid with money taken from undivided profits, which accrued and were earned during the period from May 1st to October 31st, 1870.

"That on the 15th day of April, 1871, the plaintiffs declared a dividend of $102,564$\frac{10}{100}$ from its earnings, incomes, and gains, which dividend was by the terms of its declaration made payable to stockholders on the first day of May, 1871. Said earnings accrued during the period from November 1, 1870, to April 30, 1871, inclusive.

"That on the first day of May, 1871, the plaintiffs added to their surplus the sum of $16,029$\frac{79}{100}$ of its undivided profits. Said undivided profits accrued and were earned during the period from November 1, 1870, to April 30th, 1871, inclusive.

"That the assessor of internal revenue of the United States in and for the 32nd collection district of the State of New York, did, on the 20th day of June, 1871, assess against the plaintiff a tax of two and one-half per cent. on the several foregoing amounts of $102,564$\frac{10}{100}$, $32,058$\frac{29}{100}$, $15,749$\frac{39}{100}$, $102,564$\frac{10}{100}$, and $16,029$\frac{79}{100}$, the aggregate of which
31 amount of taxes, so assessed, was $6,724$\frac{13}{100}$.

"That on said June 20th, 1871, and ever since that time, the defendant held and now holds the office of collector of internal revenue of the United States in and for the 32nd collection district of the State

of New York, and then performed and now performs the duties of said office.

"That on the 30th day of June, 1871, the defendant, as such collector, demanded from the plaintiffs the payment of said taxes so assessed as aforesaid, amounting to said sum of $6,724\frac{12}{100}$, and that on said June 30th, 1871, the plaintiffs were compelled to, and did, under protest, pay said sum to the defendant as such collector, and the defendant received the same.

"That on the 8th day of January, 1872, the plaintiffs, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury in pursuance thereof, made an appeal to the Commissioner of Internal Revenue from the aforesaid assessment and collection, in and by which appeal the plaintiffs demanded that the sum of $4,747.56
32 of the amount so assessed and collected as aforesaid should be refunded to the plaintiffs.

"That a decision on said appeal was delayed more than six months from the date of said appeal, and had been so delayed at the time of the commencement of this action, and that this action was brought by the plaintiffs after the expiration of six months from the date of said appeal, and within one year from the date of said appeal."

The foregoing comprises all the evidence adduced upon the trial, and thereupon defendant's counsel moved the court that judgment be entered for defendant, and plaintiff's counsel moved that judgment be entered for plaintiff.

After agreement and due deliberation, the court denied the said motion of defendant's counsel, and defendant's counsel duly excepted thereto.

The court then directed that judgment be entered for the plaintiff, to which direction, and to the conclusion of law of the court upon the foregoing facts as hereinafter set forth, defendant's counsel duly excepted.

The decision of the court refusing judgment for defendant and
33 directing judgment for plaintiff, and filed by the court upon the conclusion of said trial, is as follows:

SHIPMAN, J.:

This action was tried before the court, a jury having been waived by written stipulation of the parties.

The following statement of facts was agreed to by the parties, and is found by the court to be true. (The statement of facts here referred to is the same as that set forth above.)

In this case a dividend was declared in October, 1870, payable on November 1, 1870, and on the last-mentioned date an addition was made to the surplus of the bank.

This dividend and amount of surplus, it has already been decided in the National Park Bank case, were not subject to tax under the 15th section of the act of July 14, 1870.

It was not claimed at the trial that they were taxable under the sections of the act of July 30, 1864, which were repealed from and after August 1, 1870, by the 17th section of said act, and which previous section imposed a five per cent. tax.

The said bank also declared a dividend in April, 1871, payable
34 on May 1, 1871, and added an amount to surplus on the latter date, upon which two latter amounts a tax was collected.

It is not claimed that these two amounts were exempt from taxation.

The views of the court upon the questions of law are fully given in the opinion filed in the Park Bank case.

Let judgment be entered for the plaintiffs for the amt. of the taxes paid upon the dividend of October, 1870, and surplus of November 1, 1870, with interest from the respective payments.

And inasmuch as the aforesaid several matters of fact and of law do not appear by the record of said trial and judgment, therefore, on *on* the prayer of the said defendant by his counsel, the said judge has signed and sealed this bill of exceptions, this 19th day of September, in the year 1874, as yet of the October term of said circuit court as aforesaid.

N. SHIPMAN, *Judge.* [L. S.]

35 (Endorsed:) U. S. circuit court. The National City Bank versus Marshall B. Blake. Bill of exceptions. Filed Sept. 21, 1874.

36 U. S. circuit court.

THE NATIONAL CITY BANK *vs.* MARSHALL B. BLAKE. } Assignment of error.

And now the said Marshall B. Blake, by George Bliss, his attorney, says that in the record and proceedings aforesaid, there is manifest error in this, to wit, that by the said record aforesaid it appears that the judgment aforesaid was given for the said The National City Bank against the said Marshall B. Blake, whereas by the law of the land the said judgment ought to have been given for said Marshall B. Blake against the said The National City Bank. And the said Marshall B. Blake prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by reason of the said judgment.

GEORGE BLISS,
Atty. for Plff. in Error.

37 (Endorsed:) U. S. circuit court. National City Bank vs. Marshall B. Blake. Assignment of error. George Bliss, deft.'s atty.

Due service. Copy within assignment error is hereby admitted. Sept. 24, '74.

FRANCIS C. BARLOW,
Plff.'s Atty.

Filed Sept. 25, 1874.

38 U. S. Supreme Court, southern district of New York.

MARSHALL B. BLAKE, PLAINTIFF IN ERROR, *vs.* THE NATIONAL CITY BANK OF NEW YORK, defendants in error.

And afterwards, to wit, on the 25th day of September, 1874, in the said October term, in the year A. D. 1873, the said The National City Bank of New York, by Charles C. Beaman, jr., their attorney, freely come here into court, and say that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid; and they pray that the Supreme Court of the United States may proceed to examine as well the record and proceeding aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

CHARLES C. BEAMAN, JR.,
Atty. for Defendants in Error.

39 (Endorsed:) U. S. Supreme Court. Marshall B. Blake, plff. in error, vs. The National City Bank of New York, defts. in error. Joinder in error. Charles C. Beaman, jr., atty. for defts. in error. Filed Sept. 26, 1874.

40 United States of America to the National City Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1874, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Marshal B. Blake, collector of internal revenue, &c., is plaintiff in error, and you are the defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the hon'ble Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, this 23d day of September, in the year one thousand eight hundred and seventy-four.

SAM'L BLATCHFORD.

(Indorsed:) U. S. Supreme Court. Marshall B. Blake, plff. in error, vs. The National City Bank, deft. in error. Citation. George Bliss, atty. for plff. in error.

Due service copy within citation is hereby admitted.
Sept. 24, '74.

FRANCIS C. BARLOW,
Atty. for Defts. in Error.

Filed Sept. 25, 1874.

(Indorsement on cover:) No. 553. S. New York c. c. U. S. Marshall B. Blake, collector internal revenue, plaintiff in error, vs. The National City Bank of New York. Filed 6th October, 1874.